THE LAW OF THE EMPLOYERS' LIABILITY: FOR THE NEGLIGENCE OF SERVANTS CAUSING INJURY TO FELLOW SERVANTS, TOGETHER WITH THE EMPLOYERS' LIABILITY ACT, 1880, WITH NOTES

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The Law of the Employers' Liability: For the Negligence of Servants Causing Injury to Fellow Servants, Together with the Employers' Liability Act, 1880, with Notes by Thomas Beven

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PREFACE.

A LAW book can only aspire to the rank of a compilation. An original work on law belongs to jurisprudence, or the science of law—a branch of learning with which the practitioner very seldom burthens himself.

The object, however, set before me, when the present work was proposed to me, was entirely practical. The necessities of the subject required merely the treatment of the law as it had grown up, suited to the rough needs of daily life, apart from wide generalisations or theories of whatever ingenuity.

This book then is merely a compilation; and the highest excellencies it can lay claim to are those of a compilation—fulness, clearness, and accuracy.

The haste with which it has necessarily been produced forbids me to hope that it is free from defects, as well of commission, as of omission.

I trust, however, that the labour spent over it will not be wholly thrown away, and that it may serve at least as

a finger-post to point out to the often bewildered searcher the road to his destination.

If even this modest aim is attained, some part of the merit is due to my friend, Mr. H. D. Bonsey, of 1, Tanfield Court, Temple, who has revised the proof-sheets, and made many and valuable suggestions, which I have gladly adopted and incorporated in the book.

By permission of Lord Justice Bramwell, his letter to Sir Henry Jackson on the employer's liability has been inserted in the Appendix. Any contribution from the vast experience of the Lord Justice must be valuable, while the lucidity of the letter is such that it does not permit either note or comment.

THOMAS BEVEN.

1, Temple Gardens,
Temple, E.C.,
October 25th, 1880.

LAW

OF

THE EMPLOYERS' LIABILITY.

GENERAL SKETCH OF THE LAW OF EMPLOYERS' LIABILITY.

I.—The Roman Law.

Laws which have for their object the adjustment of the relation between master and servant do not find their place in a legal system until some considerable advance has been made in civilisation. And the reason is twofold. In military societies—and such were almost all the young societies of the world—personal service other than that of the soldier was held degrading and not worthy of freemen. And secondly, the position of the master was invested with such powers over the servant, that it was not till a late stage that the servant was recognised as possessed of any rights whatever.

In the earliest state of society that we can trace, free labour indeed existed; and it might be said that if there were free labourers, the mere fact of their freedom implied rights as against their employers. This, however, except in the sense that they voluntarily entered the employment, and, subject to certain limitations, might voluntarily leave it, is not so. The free labourers formed the most neglected and wretched class, and were far from being in a condition to assert rights as against their employer. (*a*)

The condition of the θῆτες in Greece, and of the mercenarii in Italy, seems, in very many respects, to have been even worse than that of the slaves; and while they, indeed, possessed a species of personal freedom, they yet seem to have been a class bordering on destitution, and were reserved for occupations for which slave labour would be too expensive, or were, at best, employed to serve in any sudden exigency. Thus, the grape and olive harvest in Italy in early times was ordinarily let to a contractor, and he hired free labourers (Umbrians probably, certainly not Romans), who conducted the gleanings for the landlord. On ordinary occasions, however, when work had to be done, and the number of slaves any one master had at his disposal was too few for the work, he borrowed others to make up the number he wanted from neighbouring proprietors, and in the event of injury to one of them the matter would be settled between the masters as an ordinary case of injury or destruction of property. (*b*) It would seem, too, somewhat questionable whether, in the days of the severest strictness

(a) Odyss. iv. 643, xi. 490, xviii. 358; Potter's "Antiquities," 57; Télfry "Corpus Juris Attici;" Taylor's "Civil Law," 413; Lev. xxv. 39, 40.
(b) Mommsen, "History of Rome," book iii. c. xii.

of the *patria potestas*, the pater familias could be prejudiced by the wrongful act of his slave. Probably the injured party might seek that personal remedy from the slave that afterwards developed into the noxal action; but any original right against the pater familias is, at the best, doubtful.

As to the liability of the master to the servant, assuming the servant to be a freeman, for several centuries after the foundation of the city, as Rome extended her empire, the necessity for considering such a question must continually have diminished. The haughty spirit that breathed in the *civis Romanus sum* could hardly have bent itself to work as a hired servant, and must have kept the number of free labourers capable of asserting rights at the very lowest ebb. While the Roman proverb, "So many slaves so many foes," speaks to the abundance of slave labour, which must, even supposing other conditions were not hostile, have driven free labour out of all competition sufficient to have justified it in asserting claims of its own. Gibbon, indeed, tells us that, in the time of Augustus, more than half the population were slaves, and he reckons them at the astounding number of 60,000,000. (*a*) It is not strange, therefore, that, in circumstances such as these, the rights of labour should be but little dwelt upon. Gaius, (*b*) however, makes it abundantly clear that a slave could claim no compensation for injury when he tells us that a slave cannot be outraged himself, though his master may be outraged in his person; but even he cannot be outraged by the same acts as make outrage in the case of a wife or a daughter. A slave, then, even if he suffered grievous bodily harm and from a stranger, had no legal right to reparation apart from his master, while it was not till the time of Hadrian that the power of putting the slave to death was taken from the master.

But probably the best reason why the law of employer and employed is so scantily illustrated in the early times of any nation whatever is found in the consideration that, in a military or unsettled state of society, where labour is intermittent and law confined to the rudest elements, the problems that would need such solution rarely arose, nor were submitted to the legal authorities; or if, indeed, they arose, were adjusted with a rude readiness more congenial to the age than any tedious disputation in Courts or before tribunals.

At the time of the legislation of Justinian, however, some of the questions relating to the liability of the employer for the acts of his servants had been mooted and legislated on. Society distinctly recognised the liability of the master for certain acts of the servant, as probably it less distinctly did long before, but it never seemed to advance to the position of compensating the servant for the act of his fellow-servant.

The law, as it was framed under Justinian's legislation, may be summed up under the following heads:—

1.—When a person undertook by contract to do anything which required the co-operation of employés, he became liable for their negligence. (*c*)

(*a*) Gibbon, "Decline and Fall," i. 68.
(*b*) Book iii. "De Injuriis," s. 222.
(*c*) "Wyss, Haftung für fremde culpa," cited by Wharton, 159.